

**FILED**  
APR 23 2010  
PATRICK E. DUFFY, CLERK  
By DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

GERALD FOSTER,	)	CV 08-130-M-DWM
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
MIKE MAHONEY, et al.,	)	
	)	
Respondents.	)	
_____	)	

Petitioner Gerald Foster filed a Rule 60(b) motion for relief from the Order of November 17, 2008, denying Foster's petition for writ of habeas corpus under 28 U.S.C. § 2254. United States Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendation on March 10, 2010. Judge Lynch recommended that Foster's Rule 60(b) motion should be granted. Respondents did not object and therefore are not entitled to de novo review of the record. 28 U.S.C. § 636(b)(1); United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003).

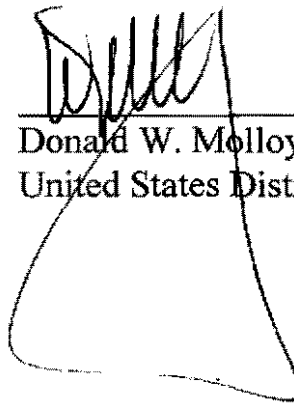
This Court will review the Findings and Recommendation for clear error.

McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a “definite and firm conviction that a mistake has been committed.” United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

Foster’s petition alleges that there were errors regarding his criminal history that affected a State of Montana felony DUI conviction in 2006. Judge Lynch found that neither the facts nor the law were correctly understood at the time Foster’s petition was denied on prescreening. Accordingly, the nature of his claims was also misunderstood. Upon further review of his claims, it appears Foster is challenging the accuracy of his criminal history, particularly a 1991 conviction, and whether the 1991 conviction was a qualifying misdemeanor offense for the later felony DUI conviction. Judge Lynch found the circumstances here are extraordinary and that relief is warranted so that Foster’s first petition can be fairly heard in this Court in the first instance. Upon review, I find no clear error in Judge Lynch’s Findings and Recommendation.

IT IS HEREBY ORDERED that Judge Lynch’s Findings and Recommendation (dkt #32) are adopted in full. Petitioner Foster’s Rule 60(b) Motion (dkt #16) is GRANTED.

DATED this 23<sup>rd</sup> day of April, 2010.



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Donald W. Molloy, District Judge  
United States District Court